A

ASEN TAPENG

v.

JAMES BAENG & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[CIVIL APPEAL NO: 12A-5-2010-II]
14 MARCH 2011

C ***ROAD TRAFFIC:*** *Driving under influence of drink - Self-accident - No direct evidence to prove deceased's intoxication was cause of accident - Alcohol level nearly three times the prescribed limit under Road Transport Act 1987 - Whether probable inference that deceased was intoxicated at time of accident - Whether deceased's inebriety had caused*
D *the same*

ROAD TRAFFIC: *Driving under influence of drink - Admissibility of blood specimen - Specimen taken five days after accident and no preservative added to prevent degeneration - Whether chemist reasons on*
E *reliability of sample acceptable*

TORT: *Vicarious liability - Road accident - Whether employer liable - Whether injury in the course of employment - Whether defence of volenti non fit injuria applicable*

F The appellant as plaintiff brought this action against the respondents as defendants at the sessions court as administrator of his son's estate, one Jusong Anak Asen. The appellant's son ('deceased') was a school teacher who met with a fatal self-accident whilst riding his motorcycle after collecting school T-shirts
G from a shop. The deceased had earlier volunteered to collect the said shirts for the school. The appellant sued the 1st respondent as owner of the motorcycle for failing to inform the deceased of the defects in the motorcycle. As against the 2nd and 3rd respondents, *ie*, the headmaster of the school and the Government
H of Malaysia respectively, the appellant claimed that the accident happened in the course of the deceased's employment and that the 3rd respondent was vicariously liable for the negligence of the 2nd respondent. The 2nd and 3rd respondents filed their defence to the action and after a full trial, the sessions court dismissed the
I appellant's action which led to the appeal herein.

The issues were (1) whether the deceased was intoxicated at the time of the accident; (2) whether the chemist's evidence pertaining to the deceased's blood sample was acceptable since it was taken five days after the accident and since too no preservative was added to prevent its degeneration; and (3) whether the 2nd and 3rd respondents were liable on the ground that the accident happened in the course of the deceased's employment.

Held (dismissing the appeal):

(1) There was no direct evidence to prove that the deceased's intoxication was the cause of the accident. However, as the alcohol level found in his blood was nearly three times the prescribed limit under the Road Transport Act 1987, the probable inference was that the deceased was intoxicated at the time of the accident and it being a self-accident, the conclusion was that his own inebriety had caused the same. (para 6)

(2) The chemist's evidence on the deceased's blood sample was acceptable as she explained in evidence very clearly on the reliability of the sample given to her with the following reasons: (1) that it was in good condition upon receipt; (2) that there was no sign that it had started to decompose; and (3) that the reported alcohol content was much higher than the prescribed limits thereby indicating that the actual alcohol content would still be above the prescribed limits even if preservative had been added. (para 7)

(3) The fact that an accident happened in the course of employment was only pertinent in a claim for workmen compensation and it per se did not find a liability under the tort of negligence. The fact of employment was only relevant when vicarious liability was pleaded against the employer but that was in a situation where the employee of such an employer was found to have been negligent against the plaintiff. If the doctrine of vicarious liability was to be applied against the 3rd respondent, it must be shown that the 2nd respondent had in some ways breached his duty of care towards the deceased which led to his death or was contributory to it. That was the very foundation of an act upon which a tort of negligence was based as established in *Donoghue v. Stevenson*. In the present case, such a duty was not breached because at the time of the accident, the 2nd respondent had done nothing to cause or contribute to the

A accident. Further, the case of *Mary Colete John v. South-East Asia Insurance Bhd* relied upon by the appellant and considered by the sessions judge was distinguished both on the facts and the law. However, the sessions judge was right when he concluded that the deceased was doing something which he
B had volunteered to do in the first place, and therefore, the defence of *volenti non fit injuria* was applicable. (paras 8-10)

[No order as to costs.]

Case(s) referred to:
C *Donoghue v. Stevenson [1932] AC 562* ***(refd)***
Mary Colete John v. South-East Asia Insurance Bhd [2004] 7 CLJ 314 HC ***(dist)***

Legislation referred to:
D Road Transport Act 1987, ss. 91, 96

For the appellant - Patrick Anek Uren; M/s Anek Uren & Partners Advocates
For the 2nd & 3rd respondents - Mohd Taufik Mohd Yusoff SFC; AG's Chambers

E *Reported by Usha Thiagarajah*

JUDGMENT

F **Rhodzariah Bujang JC:**

[1] Mr Jusong ak Asen was a teacher at SK Kuala Bok, Baram. He was originally from Kampung Sebobok, Bau. Mr Jusong ak Asen met with a fatal self-accident on 23 December 2005 at a place called Pijiru, somewhere between Bau town and his home.
G At that material time, Mr Jusong ak Asen was riding his motorcycle with his own brother riding pillion, on the way back from Kuching town after collecting an order of T-shirts from a shop there, World Sport. These T-shirts were meant for the students and teachers of his school and he had earlier in a school meeting
H volunteered to place the order and collect the T-shirts from the said shop as he would be going home for the year end school break.

[2] Now, his father, Mr Asen ak Tapeng as the administrator of
I his estate has sued the owner of the motorcycle as the 1st defendant and the headmaster of the school and the Government of Malaysia as the 2nd and 3rd defendants, respectively. His action against the 1st defendant was based on the fact that the

owner, knowing about the defects in the motorcycle had failed to inform the deceased of the same. As against the 2nd and 3rd defendants, it was premised on the fact that the accident happened in the course of his employment as he was returning from fetching the T-shirts and the weight of the same had caused him to lose control of his motorcycle. The 3rd defendant, alleged Mr Asen ak Tapeng was vicariously liable for the negligence of the 2nd defendant. Only the 2nd and 3rd defendants filed their defence to the action and after a full trial, the learned Sessions Court judge dismissed the said claim. The appeal against the dismissal of the said claim is the subject matter of this judgment.

The Judgment Of The Learned Sessions Court Judge

[3] In summary, the learned Sessions Court judge rejected the claim because the accident did not happen during the course of Mr Jusong ak Asen's employment and that the principle of *volenti non fit injuria* applies in that the purchase and carrying of the T-shirts that day was volunteered by Mr Jusong ak Asen and it was on a vehicle which was not authorized by the 2nd and 3rd defendants. On the non-authorized used of the vehicle, he relied on the case authority of *Mary Colete John v. South-East Asia Insurance Bhd* [2004] 7 CLJ 314.

[4] In his judgment he also mentioned the chemist evidence, adduced by the 2nd and 3rd defendants who confirmed that Mr Jusong ak Asen had alcohol in his blood but the chemist was not able to confirm if that level of alcohol had affected his ability to ride. The learned Sessions Court judge, however did not appear to consider this evidence as one of the grounds for dismissing the claim.

[5] In the appeal before me, counsel for Mr Asen ak Tapeng, Mr Patrick Anek Uren did submit on this evidence as showing that the deceased consumption of alcohol prior to his death was not the cause of the accident.

[6] Whilst I am in agreement with him that there is no direct evidence to say that the deceased's intoxication was the cause of the accident, but, in my view, such a conclusion is irresistible because the deceased was driving with an alcohol level way above the prescribed limit under the Road Transport Act 1987 ("the RTA 1987"). That limit was 80 milligrammes per 100 millilitres of blood whereas that of the deceased's blood was 227 milligrammes - almost three times the permissible level. The law has a reason

for setting that limit and in its wisdom knows how much alcohol a driver should consume to make him a safe driver. That prescribed limit could not have been set by legislature without any scientific basis. At thrice the amount deemed safe by the law, the probable inference that the court is entitled to make is that the deceased was intoxicated when the accident occurred and it being a self-accident, one could only conclude that his own inebriety had caused the same.

[7] Mr Patrick Anek Uren has attempted in his submission to persuade me not to accept the chemist's evidence because he said she analysed the deceased blood sample five days after it was taken and there was no preservative added to it to prevent its degeneration. With respect, I am unable to agree with him because she has explained in her evidence very clearly on the reliability of the sample given to her and gave three reasons which appear at p. 74 of the notes of proceedings why this was so. This was what she said:

> 1. **The blood specimen was in good condition at the time I received. There was no sign that it has started to decompose**.
>
> 2. The blood specimens were in fact sent to laboratory for analysis, if I not mistaken just 4 days after it was taken.
>
> 3. The reported alcohol content is so much higher than the prescribed limits. **This indicated the actual alcohol content would still be above the prescribed limits even if preservative has been added**. (emphasis added)

[8] On Mr Patrick Anek Uren's contention that the 2nd and 3rd defendants are liable because the accident happened in the course of the deceased's employment, I am of the view that such a contention is misplaced in the facts of this case because firstly, the fact that an accident happened in the course of an employment is only pertinent in a claim for workman compensation and it *per se* does not find a liability under the tort of negligence. Secondly, the fact of employment is only relevant when vicarious liability is pleaded against the employer but that is in a situation where the employee of such an employer is found to have been negligent against the plaintiff. Thus, if the doctrine of vicarious liability is to be applied in this case against the 3rd defendant, it must be shown that the 2nd defendant had in some ways breached his duty of care towards the deceased which led to his death or was contributory towards it. That is the very foundation of an act

upon which a tort of negligence is based as established in *Donoghue v. Stevenson* [1932] AC 562. Very clearly no such duty had been breached in this case because at the time of the accident, the head master had done absolutely nothing to cause or contribute to the accident.

[9] The case of *Mary Colete John (supra)* submitted by Mr Patrick Anek Uren is distinguishable on both the facts and the law. In that case whether the plaintiff was injured in the course of her employment is a relevant consideration because she was suing the insurance company of her alleged employer to enforce the judgment she had obtained against the said employer under s. 96 of the RTA 1987. It was an issue before the court because of s. 91 of the RTA 1987 which provides in the proviso thereof that the insurance policy under Part IV of the Act is not required to cover liability in respect of death or bodily injury sustained by a person 'arising out of and in the course of his employment'.

[10] Thus, Mr Patrick Anek Uren's reliance on *Mary Colete John*'s case *(supra)* is plainly wrong and the learned Sessions Court judge, by allowing himself to be dragged into the issue of whether the deceased was travelling in the course of his employment, had needlessly entangled himself in the same error. He was right however when he concluded that the defence of *volenti non fit injuria* applied to the deceased, because when the accident happened he was doing something which he had volunteered to do in the first place. It was of course unfortunate that such a terrible tragedy had befallen this young man who had just been teaching for a year after graduating from a teaching institute and no one would, but praise, his readiness to assist in the purchase of the T-shirts for his colleagues and the students of this school. It cannot be denied that the T-shirts would have cost so much cheaper here in Kuching than in that rather remote and rural part of Sarawak where the school is located and for his noble intention and on humanitarian grounds, though I dismiss the appeal, I would not order cost against the appellant.